Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Nondiscrimination in the Distribution of	)	CS Docket No. 01-7
Interactive Television Services Over Cable	)	

COMMENTS OF COMCAST CORPORATION

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SUMMARY

While it is important for the Commission to familiarize itself with technological developments and emerging services, and a Notice of Inquiry is an appropriate means for the Commission to solicit information on interactive television ("ITV"), the current Notice is a troubling step toward unwarranted regulation.

The Notice seems intent on defining an as-yet-nonexistent market. It speculates on what will be the component elements of these still-developing services. It posits a theory about cable's "significant advantage" in the distribution of such services that is largely premised on decade-old perceptions of marketplace conditions. It imagines possible sources of friction among the various players, while failing to account for their actual marketplace negotiating positions. The Notice relies upon all of all this assumption and conjecture as a basis for discussing potential regulatory "solutions" to anticipated "problems" and means of enforcing these regulatory solutions. And -- worst of all -- the Notice treats jurisdictional considerations as an afterthought.

While the Commission should seek to understand the still-inchoate ITV market, it has neither the jurisdiction nor the public interest rationale to take any regulatory action in this marketplace -- and certainly not at this time.

Comcast is committed to work to develop new ITV services that will entertain, educate, and inform, and will do so in a marketplace where it competes with broadcasting, satellite, wireless, DSL, cable overbuilders, and a wide range of other providers.

A fundamental failing of the Notice is its prominent reliance upon the 1992 Cable Act for the propositions that cable television is the "dominant platform" for delivery of multichannel video programming services and that cable market power in local distribution may necessitate "regulatory intervention" regarding ITV services. This line of analysis is pervasively flawed, for at least four distinct reasons.

First, there is a major difference between implementing the law and making the law. The fact that Congress enacted a particular statutory provision or group of provisions does not mean that the *Commission* is empowered to extrapolate from the provisions Congress enacted to fashion new requirements or prohibitions that Congress chose *not* to enact. The 1992 Cable Act established a number of regulatory requirements, but none that the Notice identifies -- or that Comcast has been able to discern -- requires or even permits regulation of ITV services.

Second, even if the 1992 Cable Act provided some support for the theory that vertically integrated cable providers "inherently" require corrective regulation, more recent articulations of legislative intent are to a decidedly different effect. The Telecommunications Act of 1996 and the Satellite Home Viewer Improvement Act, in particular, represent a significant shift in congressional policy, with less reliance on regulation and more reliance on competition.

Third, marketplace circumstances have changed dramatically since 1992. Then, most MVPD customers had only one provider available. Today, they typically have a minimum of three, and frequently more. DBS has approximately 15 million subscribers and is winning three-quarters of MVPD growth. In addition, cable operators face growing competition from other sources, including overbuilders, wireless licensees, broadcasters, and others. Also, due to ownership changes, some program providers --

particularly those affiliated with broadcast networks -- have vastly increased their bargaining power vis-à-vis cable operators.

Fourth, judicial decisions have now settled that the Commission's authority to regulate cable companies must respect and protect cable operators' First Amendment rights. The editorial discretion of cable operators should not be constrained with regulations that lack statutory authority or remedy harms that are merely conjectural. Notably, the Notice does not identify a single provision of the Communications Act that would justify the kinds of regulations that the Notice seeks to explore. And, even if the Commission had authority to impose regulation on ITV services, the premise for doing so at this time could not be anything but conjectural harms.

Regulation of ITV would be not only unlawful but also counter to the public interest. The certain result of any such regulation would be to diminish investment and innovation, thus depriving consumers of desirable, competitive services that would otherwise be made available.

Comcast therefore urges the Commission to collect facts in the current Inquiry, to reach the inescapable conclusion that neither the law nor the facts of the marketplace justify regulation of interactive television, and to end this proceeding promptly in order to remove the chilling specter of regulation from this nascent market.

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Comcast Corporation ("Comcast") hereby responds to the above-captioned Notice of Inquiry,[1/] in which the Commission has solicited comments on a number of issues relating to interactive television ("ITV") services. Although Comcast welcomes the opportunity to assist the Commission in familiarizing itself with technological and commercial developments in ITV services, our most important task is to explain clearly why any regulation (or threat of regulation) of ITV services at this time would be bad law and bad policy and would reduce, not expand, the ITV options available to consumers.

Comcast respects the Commission's desire to begin to gather information about ITV services. The Commission's decision to seek information (via Notice of Inquiry) rather than to propose rules (in a Notice of Proposed Rulemaking) is somewhat heartening. Nonetheless, the Notice is a deeply troubling document.

The Notice seems intent on defining an as-yet-nonexistent market. It speculates on what will be the component elements of ITV services that are still in an early stage of their evolution. It posits a theory about cable's "significant advantage" in the distribution of such services that is largely premised on decade-old perceptions of marketplace conditions. It imagines possible sources of

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[1/] FCC 01-15, Notice of Inquiry (rel. Jan. 18, 2000) (hereinafter "*Notice*").

friction among the various players, while failing to account for actual marketplace negotiating positions among programmers and distributors or the early state of development of ITV technologies.

The Notice relies upon all of all this assumption and conjecture basis for discussing potential regulatory "solutions" to anticipated "problems" and means of enforcing these regulatory solutions. And -- worst of all -- the Notice treats jurisdictional considerations as an afterthought.

In all these respects, this Notice represents an unwelcome departure from the procompetitive and deregulatory principles, and the fidelity to law, that have characterized the Commission's decisionmaking since the Telecommunications Act of 1996 ("1996 Act").

Comcast is committed to offering a wide range of valuable communications services to consumers. We have great confidence in our ability to work with partners to develop innovative technologies, and our ability to attract capital to deploy these services. We stand by our record as an industry leader in deploying new services, and we believe no one has responded more affirmatively to the pro-competitive, deregulatory climate created by the 1996 Act.

But the specter of regulation threatens investment, innovation, and the delivery of ITV services to consumers -- not just by Comcast, but by other cable operators and other competitors. We urge the Commission to move quickly to terminate this proceeding by concluding that regulation is neither authorized nor warranted.

I. INTRODUCTION

A. Interest Of Comcast

Comcast is one of the nation's largest and fastest-growing cable operators, with a proven track record of upgrading the systems it acquires. We are recognized for our strong commitment to deployment digital technologies and provision of innovative service options to our customers. Comcast's performance over the past several years demonstrates the soundness of the procompetitive, deregulatory policies resulting from the 1996 Act.

Infrastructure Upgrades. Faced with intense competition in our core business from providers of Direct Broadcast Satellite ("DBS") services, cable overbuilders, and others, Comcast has responded by investing in rebuilding and upgrading our systems. Currently, 86% of Comcast's customers are served by systems operating with bandwidths of 550 MHz or greater (allowing for approximately 80 channels of conventional analog video programming), and 70% are served by systems operating at 750 MHz or greater (110 channels).[2/] Every month, Comcast upgrades cable facilities serving approximately 250,000 additional homes, mostly properties newly acquired by the company. This aggressive rebuild schedule reflects Comcast's commitment to provide its customers with a full range of communications services, including new broadband offerings.

Digital Services. Comcast's investment of several billion dollars in fiber optics and nationwide system rebuilds since 1996 has enabled it to deploy an array of new digital services.[3/] Comcast is a recognized industry leader in providing digital cable

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[2/] Frequency requirements vary for different services. Compressed digital video channels do not require the same 6 MHz per channel that is used for analog video. The limited bandwidth of the cable plant is increasingly shared with services other than video, including high-speed cable Internet service, program guides, and more.

[3/] This investment has been financed by investors and has been taken solely at Comcast's risk. Although Comcast anticipates a continued high level of favorable consumer response to its new services, Comcast neither expects nor receives any assurances of financial success.

services, and already has over 1.35 million customers for this service. We had *no* customers for this service just two years ago, yet we expect to close out this year with more than two million digital cable subscribers.

During the past year, Comcast increased its focus on an accelerated rollout of its high-speed cable Internet service through Comcast@Home, [4/] which is currently available to nearly 6.4 million homes. Comcast currently has 400,000 customers and projects having 800,000 customers by year-end 2001.[5/]

Comcast's deployment of broadband services also includes the provision of wired local exchange service and a continued leadership role in developing IP telephony.

In addition to new lines of business such as high-speed cable Internet services and telephony, Comcast is in various stages of developing and deploying other new services for its customers. As Comcast Cable Communications President Steve Burke has stated: "Our goal is to launch one or 2 major products every year for the next 5 to 10 years and turn our company into a new products company."[6/]

Competitive Circumstances. Comcast faces intense competition in every segment of its business. In markets for multichannel video programming, DirecTV and Echostar (Dish TV) are major players of nationwide scale, and their services are available to consumers throughout the territories served by Comcast. In high-speed Internet, numerous ISPs (most notably AOL) are using Digital Subscriber Line service (obtained

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[4/] Comcast@Home delivers high-speed broadband Internet services directly to a customer's personal computer using a coaxial cable connection and cable modem. Comcast@Home also provides local content, e-mail, personal web space, chat rooms, and round-the-clock, toll-free, customer support.

[5/] Late in 2000, Comcast announced an agreement with Juno to conduct a multiple ISP trial, beginning first quarter 2001. Efforts are continuing to arrange for other ISPs to participate.

[6/] Alan Breznick, *Cable Operators Aim for Steady Flow of Digital Services*, COMMUNICATIONS DAILY, at 3 (Sept. 22, 2000).

from Verizon, SBC, and BellSouth) as the basis for services that compete directly with Comcast @Home. RCN is constructing competing wireline systems that already provide cable and high-speed Internet services throughout significant portions of Comcast's territory.[7/] In addition, companies such as Americast and Knology provide, or soon will provide, competing broadband wireline services in other Comcast markets.[8/]

B. ITV Services

Comcast is interested in and working to explore, test, and market new offerings that combine traditional video programming with interactive functionalities. We plan to bring a range of new interactive entertainment, information, and educational services to consumers in the home that go well beyond the rudimentary interactive capabilities that are currently available. These services, some of which might be described as forms of "interactive television," include video-on-demand,[9/] interactive program guides, advanced home shopping, and digital video recording features,[10/] among others.[11/] But full realization of these plans is neither imminent nor guaranteed. All of these services are in

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[7/] RCN has agreements to serve 20 communities around Philadelphia, PA, and is currently building/serving in 15 (including Philadelphia suburbs and Union, NJ). RCN is also providing OVS service under the Starpower name in Washington, DC and Gaithersburg, MD, and has been awarded cable franchises in Arlington, VA, Prince George's County, MD, and Montgomery County, MD. Further, RCN is in negotiations in Baltimore County, MD, Alexandria VA, and Reston, VA, as well as several communities in the Philadelphia and New Jersey areas.

[8/] Knology competes against Comcast in Charleston, SC, Panama City, FL, Huntsville, AL, Knoxville, TN, and Augusta, GA. Americast (SBC) operates cable systems in 16 Michigan cities where Comcast also provides service.

[9/] Comcast is working on video-on-demand with SeaChange International in Northeastern New Jersey as well as with Concurrent in Philadelphia, Pennsylvania.

[10/] Comcast is conducting trials with TiVo and Replay TV for digital video recording features, and continues to work with set-top manufacturers for integrated boxes.

[11/] Comcast is currently working on interactive television trials, including trials with WINK Interactive Television in Chesterfield and Prince William Counties, VA and with Liberate Interactive Television in undisclosed markets. *See, e.g., Comcast Launches Its First Wink-Enhanced TV Service to Digital Cable Customers in Virginia*, Wink Press Release, http://biz.yahoo.com/prnews/010307/sfw064.html, viewed Mar. 8, 2001.

early stages of evolution, and many technical, commercial, and marketplace issues remain to be worked through.

A discussion of "ITV" is inherently complicated. For one thing, "interactive television" is not a single service but rather a variety of different potential services. For another, ITV services involve technology that is rapidly and continually evolving, commercial relationships that have yet to be established, and consumer desires that have yet to be ascertained.

There is no one service now, nor is there likely to be one in the future, known as "interactive television." Rather, the notion of ITV encompasses multiple potential services. These may enable customers to engage in such divergent activities as:

- selecting any movie (or other programming) that the customer desires from a storage system, and viewing it, in real time, with VCR-type functionalities ("video-on-demand");
- obtaining additional information about a particular video offering (electronic program guide) and perhaps linking to additional data about the actor, actress, director, etc. -- or statistics about a sports player or team ("enhanced television");
- playing along with a televised game ("play TV");
- viewing Internet content on a television screen ("Internet TV"); and
- accessing more information about a product being advertised during a television program and purchasing it if desired ("t-commerce").[12/]

This is only a partial list of potential "ITV" offerings, but it suffices to establish that the potential services are many and varied.

[12/] Considerable variation can be envisioned within each of these various categories. For example, one form of "t-commerce" may entail the ability, say, to purchase the style of dress worn by the star of a situation comedy or products featured on the set. A different form of "t-commerce" could be to create an extension of the QVC shopping channel that presents an extremely wide array of shopping opportunities, independent of any entertainment programming.

Some of these will be enhancements to a television program. Others will be an outgrowth of something viewed during a TV program or commercial. Still others may be altogether unrelated to a television program (Internet surfing, e-mail, or instant messaging). Each of these potential services entails different technical arrangements and different potential participants and different commercial arrangements among the participants and, in all probability, different responses from consumers.[13/]

Comcast is exploring all of these possibilities, and others, but there is a long road ahead before some of these ideas will ripen into real-world services. Comcast intends to be careful to provide subscribers to its ITV services an experience that is rewarding, not filled with confusion or frustration.

II. THERE IS NO BASIS IN LAW OR POLICY FOR REGULATING ITV SERVICES.

The Commission is a creature of statute, and during the past five years the Commission has rightfully taken pride in its commitment to implement faithfully the law as Congress wrote it. For that reason, it is an unwelcome surprise to find that the ITV Notice treats jurisdictional issues as something of an afterthought, asking questions about the agency's statutory authority only after first hypothesizing numerous expected characteristics of, and "problems" in, the "ITV market."

As a matter of policy, Comcast believes the Commission should always exercise care not to intrude into a marketplace prematurely or unnecessarily. This is especially

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13/ It is far from clear which "platform" will have the edge in delivering ITV services. "According to a report from Cahners In-Stat Group, digital direct-to-home satellite services are pulling way ahead of digital cable TV providers in the race to get interactive digital television services to market." "Cable Burned by Bird," CEDaily (Jan. 22, 2001), http://www.cedmagazine.com/cedailydirect/0101/cedaily010122.htm#2, viewed Jan. 23, 2001. The article quotes an analyst at Cahners In-Stat as saying, "Certainly one of the reasons for the higher numbers for satellite is, because when it's turned on, coverage is instant across an entire region, and cable services must be rolled out on a neighborhood by neighborhood process." *Id.*

true with services that are just beginning to evolve. It is all the more true where Congress has not conferred regulatory authority.

A. The Notice Rests On A Premise That Is Demonstrably False.

An especially peculiar feature of the Notice is its prominent reliance upon the 1992 Cable Act. Although most of the discussion of legal issues can be found at the very end of the Notice, one very early reference indicates that the preparation of this Notice proceeded from an erroneous premise.

The very first substantive paragraph of the Notice (immediately following a very general paragraph summarizing the scope of the proceeding) cites the 1992 Cable Act as representing a congressional determination "that cable television was the dominant platform among multichannel video programming distributors ("MVPDs")," and that "cable market power in local distribution necessitated regulatory intervention" in certain situations. *Notice* at ¶ 2. The paragraph goes on to say that, "[i]f the same factual predicates that Congress cited in the 1992 Cable Act were to apply to a distribution platform delivering ITV services, then some regulation of those distribution facilities might be warranted," particularly insofar as vertically integrated cable programmers are concerned. *Id.* This line of analysis is pervasively flawed, for four separate reasons.

First, there is a major difference between following the law and making the law. The fact that Congress is thought to have followed a particular line of reasoning in enacting a statutory provision does not mean that the *Commission* is empowered to *extrapolate* that reasoning as a basis to impose a requirement or prohibition that Congress chose *not* to enact. Indeed, Congress has specifically foreclosed such an approach.[14]

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[14] 47 U.S.C. § 544(f)(1) (federal, state, and local authorities "may not impose requirements regarding the provision or content of cable services, *except as expressly provided in this title*") (emphasis added).

The key statutory provision cited in the Notice is section 613(f) of the Communications Act.[15] This subsection, however, provides no basis for regulation of ITV services. Indeed, as discussed in greater detail in Section II.B., no provision of the Communications Act empowers the FCC to regulate cable companies' ITV services.

Second, even if the statements in the Notice accurately capture the reasoning underlying the 1992 Cable Act, in subsequent enactments Congress adopted a distinctly different policy orientation. The Telecommunications Act of 1996, in particular, represented a conscious decision to rely more on competition and less on regulation to promote the public interest. Pertinent provisions manifesting this philosophy, and applying it specifically to MVPD services, include the explicit sunsetting of cable rate regulation[16] and the creation of a new vehicle for telephone companies and others to offer MVPD services.[17] More recently, Congress passed the Satellite Home Viewer Improvement Act ("SHVIA"),[18] which created competitive balance between DBS and cable in the MVPD market. Thus, while those provisions of the 1992 Act that remain in the Communications Act continue to have the force of law, the justification for extrapolating from that statute to create new obligations rests on particularly tenuous logic.

Third, marketplace facts have changed dramatically since 1992. Back then, DBS was nonexistent; today it has approximately 15 million subscribers.[19] Cable's share of

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15/ *Notice* at ¶ 2.

16/ 47 U.S.C. § 543 (a)(4).

17/ 47 U.S.C. § 573.

18/ SHVIA was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, Pub.L. No. 106-113, 113 Stat. 1501, 1501A-526-1501A-545 (Nov. 29, 1999).

19/ *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Seventh Annual Report (rel. Jan. 8, 2001) ("*7th Video Competition Report*"), at Table C-1 (12.9 million as of June 30, 2000, with a rapid rate of growth).

the MVPD market has declined in each of the past five years and is now at 80 percent and dropping.[20] Moreover, due in part to SHVIA, the growth of DBS is still accelerating; three-quarters of MVPD growth from June 1999 to June 2000 was captured by DBS, not cable.[21] One court has even said that an assessment of the market power of cable MVPDs *as of 1999* is no longer relevant due to the "substantial changes" that have occurred subsequently.[22] *A fortiori*, the changes since 1992 have been all the more substantial.[23]

The marketplace has changed in other ways, as well. For example, each broadcaster has been given an additional six megahertz of spectrum, creating the potential for new multichannel video services. MMDS, LMDS, and other wireless services have experienced dramatic growth and show a strong potential to compete with all of the various services that have been or will be provided over cable companies' facilities. Cable overbuilding, virtually nonexistent in 1992, is now a reality in a growing number of markets. In these and other ways, competition among multiple, diverse, vertically integrated platforms is increasing -- and the need for regulation of any one medium is correspondingly decreasing.

Fourth, the courts have now made it clear that any analysis of the Commission's authority to regulate cable companies must take full account of cable operators' First Amendment rights and, therefore, any regulation of cable services must be grounded in

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[20] *7th Video Competition Report* at Table C-1. That number is as of June 30, 2000.

[21] *7th Video Competition Report* at 6-8 (nearly three million new subscribers for DBS; one million for cable). DBS has been further strengthened by recent marketing alliances with local telephone companies.

[22] *Time Warner Entertainment v. United States*, No. 94-1035 (D.C. Cir. Mar. 2, 2001)(*"Time Warner II"*), slip op. at 14.

[23] Another change over the past few years is that, due to ownership changes, some program providers -- particularly those affiliated with broadcast networks -- have vastly increased their bargaining power vis-à-vis cable operators.

specific statutory authority and addressed to genuine -- not speculative -- marketplace harms. The Supreme Court has specifically recognized that cable operators (unlike telephone companies that simply transmit messages on behalf of others) are themselves "speakers" for First Amendment purposes: "cable operators engage in and transmit speech, and they are entitled to the speech and press protections of the First Amendment."[24/] Subsequent decisions by the courts, including most particularly the D.C. Circuit's ruling striking down the Commission's vertical and horizontal cable rules,[25/] underscore the need for any FCC regulation of cable operators to respect and protect cable operators' rights under the First Amendment.[26/]

To understand these cases properly, and to place in sharp relief the flaw in the analysis relied upon in the Notice, it is essential to understand the inherent difference between cable companies and telephone companies. The integration of content and distribution is antithetical to the idea of common carriage. Common carriers carry information for others; whether the information is voice, data, or video, and whether the waveforms are analog or digital, the role of the common carrier is to service all,

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[24/] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 640, 637 (1994)("*Turner I*"). In *Turner I*, the Court declined to rule on the merits of the "must-carry" requirements. Even though those must-carry requirements were based upon "unusually detailed statutory findings" that, without must-carry, "the continued availability of free local broadcast television would be threatened," thereby imperiling "the survival of a medium that has become a vital part of the Nation's communications system" and the ability of "every individual with a television set [to] obtain access to free television programming," the court remanded for further evidence to ascertain whether the governmental interest asserted was in fact real and that the must-carry obligation did not burden speech more than necessary to advance that interest. *Id.* at 664-668. After remand, and detailed review of the numerous facts supporting the congressional judgment, the Supreme Court upheld the must-carry requirements on a 5-4 vote. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"). There are, of course, no statutory findings -- "unusually detailed" or otherwise -- regarding the need for ITV regulations.

[25/] *See Time Warner II.*

[26/] Two other recent decisions confirm the need for sensitivity to First Amendment considerations. *See Comcast Cablevision of Broward County v. Broward County*, Case No. 99-6934-CIV, slip op. at 22-24 (S.D. Fla., Nov. 9, 2000); *Charter Communications, Inc. v. County of Santa Cruz*, Case No. C99-01874 (N.D. Cal., Mar. 7, 2001).

indiscriminately. That being the case, the central obligation is to avoid unjust or unreasonable discrimination.[27]

Cable is distinctly different. Cable service necessarily *integrates* content and conduit. Cable operators do not *provide distribution*; rather, they *distribute content*. As a matter of editorial discretion, they choose what content to offer (whether they buy it or make it), they package it, and they sell it. While Congress has crafted certain specific "public easements" (PEG channels, must-carry, and leased access) on the private property of the cable operator, control of the platform *and its content* rests with the cable operator.

It thus represents a fundamental misapprehension of the nature of cable service to suggest that the cable operator must never "discriminate" in providing access to its platform.[28] Such a suggestion is no more accurate than saying that a broadcaster must function as a common carrier in selecting the programming to be offered over its television or radio channel -- or that a newspaper publisher must select the contents of tomorrow's newspaper on an "equal access" basis.

Thus, ITV services cannot be regulated on the basis of the kinds of theories that may pass muster in the common carrier context. Regulations that impinge on cable operators' First Amendment rights can be upheld only on the basis that Congress has drawn "reasonable inferences, based upon substantial evidence," concerning the potential for real problems in a real market.[29] But in the ITV context (and contrary to implications in the Notice), there is no basis for anticipating market failure. To be sure, cable

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[27] *See* 47 U.S.C. §§ 201(b), 202(a).

[28] *See Notice* at ¶¶ 3, 4, 21-38.

[29] *Time Warner Entertainment v. United States*, 211 F.3d 1313, 1319-1320 (D.C. Cir. 2000)("*Time Warner I*").

companies such as Comcast bring a variety of strengths to these potential services, but there is no foundation for assuming that these strengths will lead to improper behavior or mistreatment of programmers or other entities. Thus, any regulation of ITV services would necessarily be predicated upon guesswork by the Commission about future problems in a "market" that has yet to develop.[30/] Indeed, it is difficult to recall any recent Commission document that relies more on conjecture than does the current Notice.

B. The Communications Act Does Not Provide For The Regulation Of Cable Companies' ITV Services.

For the most part, the jurisdictional section of the Notice has an appropriately neutral quality. It asks various questions intended to ascertain whether ITV services are properly classified under Title VI, Title II, or Title I of the Communications Act. But even here, a predisposition toward government intervention is reflected in a threshold reference to "Commission *protection* of ITV services." *Notice* at ¶ 43 (emphasis added). And the implication of that reference is clear from the preceding paragraphs, which speculate at length about ways in which cable operators may have the incentive and the ability to behave anticompetitively toward unaffiliated providers of ITV services. The jurisdictional analysis should be free of any such bias.

Comcast believes the jurisdictional analysis is straightforward. Just as the questions in this Notice are much like those the Commission has asked in connection with the pending Notice on High-Speed Internet Access, *see Notice* at ¶ 44, so too are

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[30/] It is of course significant that the U.S. Court of Appeals has reversed and remanded the vertical and horizontal rules the Commission adopted to fulfill its obligations under section 613(f). It did so largely on the basis that the Commission had relied excessively on conjecture in fashioning those rules. *Time Warner II*, slip op. at 12, 13, 18, 30.

Comcast's answers. Comcast will not repeat here the detailed analysis it presented in that other proceeding.[31] For present purposes, a few succinct points will suffice.

Title VI: Most, if not all, ITV services will fall squarely within the statutory definition of "cable service." This statutory definition has been expanded to encompass not just the one-way transmission to subscribers of video programming but also "other programming service," as well as "subscriber interaction . . . which is required for the selection or use of such programming." 47 U.S.C. § 522(d). The argument, which is compelling in the high-speed Internet context, is even stronger here. Note, for example, that, in opposing classification of cable Internet services as cable service, a coalition of consumer organizations stated the term "or use" did not cover *that* service but was intended instead to "capture the interactivity surrounding video programming services."[32] Such interactivity, of course, is at the heart of the present proceeding and is, as the consumer organizations previously said, the kind of "use" encompassed in the definition of "cable service."

Of course, the fact that ITV services qualify as cable services is no basis for FCC regulation of such services. Title VI specifies which requirements apply, and it includes must-carry and leased-access requirements, rate regulation, behavioral prohibitions, and privacy protections, as well as requirements for ownership limits. But it contains no provisions calling for rate regulation of ITV services, for unbundling of ITV services, for carriage of ITV signals, or for nondiscriminatory treatment by cable operators of would-be ITV service providers.

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[31] *See* Comments of Comcast Corporation, at 11-31, GEN Docket No. 00-185 (filed Dec. 1, 2000).

[32] *See* Comments of Texas Office of People's Counsel, Consumer Federation of America, and Consumers Union, at 19, GEN. Docket No. 00-185 (filed Jan. 11, 2001).

The Commission has been admonished that restrictions of cable operators' speech must be predicated on "a record that validates the regulations, not just the abstract statutory authority." *Time Warner II, slip op.* at 7 (emphasis removed). In the case of ITV services, it appears that the Commission lacks even the "abstract statutory authority" that undergirded the recently reversed and vacated horizontal and vertical rules.

This lack of authority is apparent from the Notice itself. The discussion of proposed regulations in the nondiscrimination section (¶¶21-38) is devoid of any citation to any provision of Title VI which the Notice asserts to be applicable. Rather, the Notice seeks to extrapolate from existing law by employing "the same reasoning used by Congress" to new situations.[33/]

Moreover, the potential regulations discussed in the Notice not only lack statutory authority but also in some cases actually conflict with the laws Congress wrote. For example, although Congress gave local broadcasters the right to have their signals carried on same-market cable systems, and did not extend that right to nonbroadcasters,[34/] the Notice suggests that nonbroadcasters should be treated for ITV purposes the same as broadcasters are. *Notice* at ¶ 28. In the same vein, although Congress decided that must-carry rights do not encompass portions of the video signal that include material that is not program-related,[35/] the Notice flirts with the idea of establishing requirements for ITV services that are *not* associated with any particular video signal. *Notice* at ¶ 29. Fundamentally, all of the rules that the Notice discusses are ones that assume the cable operator has no more right to its platform than does anyone else and that it has a general duty of nondiscrimination. This, of course, would convert cable operators into common

[33/] Notice at ¶21; *see also id.* at ¶¶2 (invoking "same factual predicates"), 34 n.25 ("analogous").

[34/] 47 U.S.C. § 534(a), (c), (h).

[35/] 47 U.S.C. § 534(b)(3).

carriers.[36] Yet the statute unambiguously directs that a "cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." 47 U.S.C. § 541(c).

Title II: There is no conceivable basis for regulation of cable ITV services under Title II. The Notice asks "whether the existence of the ITV enhancements component renders ITV services a telecommunications service subject to Title II." *Notice* at ¶ 46. But the further "enhancement[]" of a service that already consists of a great deal *more* than pure transmission capacity merely makes the service all the *less* susceptible to classification as a Title II telecommunications service.

ITV services will consist of an abundance of content of the cable operator's choosing (not the "user's choosing"), *plus* the subscriber's interaction with that content. Nothing could be further from the offering of a pure transmission capability, transmitting only information of the user's choosing, "without change in the form or content of that information." *See* 47 U.S.C. § 3(43) (definition of "telecommunications"). This is especially so given that ITV services will inherently involve "subscriber interaction with stored information" both in headend servers and in digital set-top boxes, making this very much the kind of thing the Commission fenced off from Title II regulation in *Computer II*. *See* 47 CFR § 64.702(a).[37]

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[36] Even Title II, it should be noted, does not bar all discrimination, but only that discrimination which is unjust and unreasonable. *See* 47 U.S.C. § § 201(b), 202(a). The Notice, however, seems to regard all discrimination as improper. *See, e.g., Notice* at ¶¶ 3, 4, 21, 24.

[37] The definition of an enhanced service actually includes three categories of services, those "which [i] employ computer processing applications that act on the format, content, code, protocol or similar aspects of a subscriber's transmitted information; [ii] provide the subscriber additional, different, or restructured information; or [iii] involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a). Although meeting any *one* of these definitions is sufficient to render a service "enhanced," ITV services would seem to qualify under all *three* of these definitions. As the rule states, "[e]nhanced services are not regulated under Title II of the [Communications] Act." *Id.*

Advanced Telecommunications Capability. The Notice solicits comment on whether ITV services are subject to regulation as "advanced telecommunications capabilities." *Notice* at ¶ 47. The notion of advanced telecommunications capability, as set forth in section 706 of the 1996 Act, was not codified in the Communications Act. It exists outside that statute, as a general instruction for what the Commission is to monitor, promote, and otherwise treat in conformity with the authority conferred upon it by the Communications Act. But section 706 of the 1996 Act is not itself an independent grant of regulatory authority and it provides no colorable justification for regulation of ITV services.

***Information Service*:** The Notice also asks whether ITV services can properly be classified as information services. *Notice* at ¶ 48. Comcast believes that they can. It is important to understand that (1) an information service can have underlying "telecommunications" without having an underlying common carrier communications service, and (2) classification of something as an information service is not mutually inconsistent with classification of that same service as a cable service. Classification of an offering as an information service has heretofore meant that the Commission left the service *unregulated*. This was the genius of the *Computer II* decision, and it is the approach that should be maintained here.

***Hybrid Service*:** Finally, the Notice asks whether ITV services should be classified "as a hybrid service subject to multiple provisions of the Act." *Notice* at ¶ 49. Comcast is unaware of any legal justification for such an approach. Comcast also is unable to imagine what public policy would be advanced by such an approach; indeed, it would appear to promote regulation and diminish competition, contravening the explicit objectives of the 1996 Act.

C. Regulation Of ITV Services Would Diminish Investment And Innovation And Deprive Consumers Of The Benefit Of New Services.

Even if the Commission had authority to regulate ITV services, which it does not, it would be inadvisable for the Commission to attempt to control the manner in which these services develop. Regulation of these "nascent"[38/] (or "gestational"[39/]) services would not be beneficial or even benign. More likely, it would skew the marketplace and hinder their development.

Many technical and commercial issues need to be worked through to bring ITV services to market. There is no reason whatsoever to believe that regulatory "assistance" will accelerate this process.[40/] To the contrary, the surest consequence of regulation will be to diminish the availability of capital, thereby slowing the pace of innovation and in all probability delaying the availability of services to consumers.[41/] Regulation may also skew competition by directing the flow of capital away from cable and toward other distribution media (*e.g.*, satellite, wireless, broadcast, common carrier). It would also likely complicate the negotiation of mutually satisfactory commercial relationships among market participants -- which is already a complex task given the rapid pace of technological change, the unknown wishes of consumers, and the inherent risks of new businesses.[42/]

38/ *See, e.g., Notice* at ¶ 20.

39/ *See id.*, Dissenting Statement of Commissioner Furchtgott-Roth.

40/ The Commission's experience with video dialtone is somewhat instructive . That is a service that had an elaborate regulatory regime, with detailed rules to anticipate and correct for all manner of potential discrimination. There are, however, no providers of the service -- or customers either.

41/ This is the logic upon which the Commission properly relied in deciding not to regulate cable Internet services. *See, e.g.*, "*Broadband Today*," FCC Cable Services Bureau, at 45 (1999). The logic is all the more powerful in the case of services that are even less fully evolved.

42/ *See, e.g.*, "ITV's Slow Motion: What's Behind the Sluggish Rollout of Interactive Television," P. Volle, Inside.Com (Dec. 29, 2000) ("[D]espite an expected 17 million digital-TV households in the U.S. by the end of 2000, interactive advertising is so far a nonstarter-and it's likely to remain this way for several more years to come . . . . The main reason the interactive-

The single greatest achievement of the Telecommunications Act is that it has promoted growing competition among different media. Multichannel video services are available from multiple suppliers, as are high-speed Internet services. Competition is lacking in local telephone services, but even in that market new services (IP telephony; instant messaging) or lower prices (for cellular and PCS) are creating new options for consumers. These developments powerfully underscore the need to continue, and accelerate, the shift from regulation to competition as the means of disciplining the behavior of market participants.

Comcast is excited about the endless possibilities made possible by new technologies. Comcast expects to continue to support the deployment of new services, as ideas ripen and plans and projections become market realities. Over time, ITV services are likely to become part of the mix of products and services Comcast makes available to its customers.

This progress, however, is not guaranteed. Regulation -- or even the threat of regulation -- could complicate and delay the evolution of ITV services. It might help certain favored companies, by strengthening their bargaining power versus other companies, or by redirecting investment from one distribution platform to another. But competition in the marketplace would necessarily be skewed. Worse, the inevitable result of such intrusion in the market would be harm to consumers, by diminishing the choices they should be able to enjoy.

TV market has been slow to develop is fragmentation and the resulting lack [of] a single technical standard . . . . Technology aside, interactive advertising is meeting with resistance from the programming channels themselves"); "Wireless, Interactive Ad Opportunities Limited - Jupiter," Reuters (Feb. 20, 2001), http://biz.yahoo.com/rf/010220/n20651432.html, viewed Feb. 20, 2001 (predicting "[s]mall and fragmented" ITV audiences for next four years). *See also* "Experts Say Interactive TV Profits Are Still Years Away," Communications Daily, at 4 (Mar. 1, 2001).

CONCLUSION

Comcast perceives no legal basis -- and no public policy need -- for regulatory intervention with regard to ITV services. The sooner the Commission makes clear its intention to leave ITV services alone, the better.

Respectfully Submitted,

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